United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7463

United States Court of Appeals
FOR THE SECOND CIRCUIT

FOOTNER & CO., INC., et al.,
Plaintiffs,

against

SS AMAZONIA, her engines, etc. COMPANHIA DE NAVEGACAO MARITIMA NETUMAR, et al.,
Defendant-Appellant and Third-Party Plaintiff,

and against

NEW JERSEY EXPORT MARINE CARPENTERS INC.,
Third-Party Defendant-Appellee.

B
P/S

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Plaintiff-Appellant,

against

UNITED TERMINALS, INC.,
Defendant,

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant-Appellee.

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

This is an appeal from a decision by Judge Owen, after a non-jury trial, which denied recovery to a shipowner for the failure of a sub-contractor to properly lash cargo. The opinion has not been reported.

Statement of the Case

Appellant operates a line of general cargo ships between Brazil and the U.S. East Coast. Respondent has a cargo lashing and securing business in the port of New York. On January 18, 1971, after loading cargo which had been secured by respondent, the M.V AMAZONIA sailed from New York bound for Brazil. In the vicinity of Bermuda the ship encountered moderately heavy seas, and two large tractors stowed below deck broke loose. The rolling ship propelled one of the loose tractors with such force that its trunnion arms pierced the ship's side. The incoming water and subsequent salvage efforts caused the loss and damage which is the subject of this action.

The consolidated suits were brought to recover for cargo damage, and for the vessel's losses while undergoing repairs at Bermuda and elsewhere. Since there was no valid defense to the cargo claims, appellant settled them on advantageous terms. Proof of loss was deferred pending the initial determination of liability. Thus, the only issue was the liability of respondent for the stowage failure.*

I

The trial court failed and neglected to make the findings and conclusions required by Rule 52(a) of the Federal Rules of Civil Procedure, and which a major case would warrant in any event.

In a non-jury action tried upon the facts, Rule 52(a) of the Federal Rules of Civil Procedure imposes upon the trial court the duty to make findings of fact, and to state its conclusions of law. It is implicit that the function is to be carried out with care and with full attention to the

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* The stevedore, United Terminals, Inc., was also sued but was properly dismissed when respondent conceded its work was unaffected by acts of the stevedore.

evidence in the record, and to the binding decisions of higher courts. The decision below is itself persuasive evidence that the District Court failed to properly perform its function in this case.

The trial lasted four days, during which the court heard sixteen witnesses and was shown eighty-three exhibits. The facts and the legal authorities were extensively briefed, and proposed Findings and Conclusions were submitted both before and after the trial. Over six months after the trial ended, the court rendered a short, sketchy opinion, absolutely devoid of any legal citation and dealing almost exclusively with minor matters.

There is not even a comment on the respondent's warranty of workmanlike performance, or the duties and obligations required by that warranty and so carefully delineated in prior decisions of this court.

There is extensive comment on the weather which obviously caused the ship to roll. Beyond that, the weather had no relevance since it was clearly insufficient to constitute a peril of the sea.

There is specific comment on an alleged fire (nowhere claimed as a cause of damage) and the only relevance of which is said to be that it may have diverted attention after the tractors broke loose, i.e., *after* the failure of the lashings.

The trial court completely disregarded sworn admissions and direct testimony that the tractors were improperly secured, and relied on a certificate which did not cover the tractors and whose author did not testify.

The court speculated that newsprint in the same compartment could have come loose, apparently unaware of the burden of proof or that this same newsprint had been resecured at New York by the respondent lasher.

The court speculated that other cargo could have knocked out the chocking under the wheels (axles?) although re-

spondent's president had affirmed under oath that there was no such chocking.

The foregoing makes it clear that six months after the trial, the court had only a vague recollection of the controlling evidence and, as we have already pointed out, seemingly failed to avail itself of the authorities attempted to be called to its attention, and cited none in its opinion. It is respectfully submitted that the District Court failed in this instance to adhere to the standards that this Court has said are incumbent upon it. *United States* v. *Forness*, 125 F. 2d 928, 942-943, cert. denied, 316 U.S. 694 (1942).

II

The trial court was apparently unaware of the warranty standards imposed by a marine service contract.

After a discussion which did not even mention the duties imposed by law upon respondent, the trial court concluded "it is impossible to tell why the Terex broke loose" and, "In any event, the AMAZONIA has not met its burden of proving the cause." (A8) These statements demonstrate an erroneous belief that the case was governed by simple concepts of negligence. The controlling warranty of workmanlike service, although fully briefed, was either ignored or misunderstood or forgotten.

The Supreme Court held in *Ryan* v. *Pan-Atlantic Corp.*, 350 U. S. 124, 133, that a stevedore's agreement to perform services necessarily implies an obligation to stow cargo "properly and safely". The lashing and securing performed by this respondent is but a sub-division of a stevedore's work and as a marine service contract, would be subject to the same high standard. *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310 (2 Cir., 1958). In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, the Supreme Court re-affirmed its earlier decision, explaining that the undertaking to perform properly and safely is the equivalent of a manufacturer's warranty of its product.

The decisions make it clear that negligence is not the proper concept. *Italia, supra,* specifically states that absence of stevedore negligence does not prevent a shipowner from recovering under the warranty; a failure to perform safely incurs liability, regardless of whether or not there was negligent conduct, *Italia, supra,* pp. 318-319.

> ". . . while recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., supra, and the description of the stevedore's obligation is one of performance with reasonable safety is not a reference to the reasonable-man test pertaining to negligence, but a delineation of the scope of the stevedore's implied contractual duties." (p. 321)

Even the shipowner's negligence "is not fatal to recovery against the stevedore" (p. 320). Nor is the shipowner's failure to discover the defective condition a bar to recovery.

> *Weyerhauser SS Co.* v. *Nacirema Co.,* 355 U.S. 563, 568.
> *Ryan* v. *Pan-Atlantic Corp.,* 350 U.S. 124, 134-5.

The true test is simply to determine which party was best able to prevent the casualty. By applying this simple test, said the Supreme Court, the hazards will be lessened and the burden will fall upon the party who exercised control of the work and equipment, and who could have avoided a preventable accident with proper care. *Italia, supra,* p. 324; *Fernandez* v. *Chios Shipping Co. Ltd.* (2d Cir., 1976) 542 F. 2d 145. And that duty to take preventive measures also extends to the equipment used. The service contractor is even liable for latent defects in the equipment since, "The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equip

ment and relies on the competency of the stevedore company." *Italia, supra,* p. 323.

Given the above parameters, these were the relevant facts in the instant case.

1. The Terex tractors broke loose in expectable weather; i.e., it was a preventable accident.

2. The complete job of lashing and securing the tractors was performed by the respondent.

3. All of the lashing and securing gear was supplied by respondent, and there is direct and uncontradicted photographic evidence that some of the wires and at least one turnbuckle failed.

4. The respondent lasher was the one best able to adopt preventive measures which would have avoided the casualty.

In a similar case, remarkably close on its facts, Judge Bonsal carefully reviewed the controlling decisions and found the lasher liable. *Master Shipping Agency, Inc.* v. *M. S. Farida,* —— F.S. ——, 1976 A.M.C. 91 (SDNY 1975).*

Although the same cases were brought to the attention of the trial court, they were not given proper consideration. The inadequacy of the lashing is not excused by the shipowner's failure to discover the fault, nor by its acceptance of the work, nor even by the owner's concurrent negligence (assuming it were present). The only available ground for avoiding responsibility was for the lasher to prove that the shipowner actively hindered him from doing a proper job. There is no such finding, nor is there any basis for such a finding.

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* We cannot refrain from urging a comparison of Judge Bonsal's carefully written opinion with the one here appealed.

III

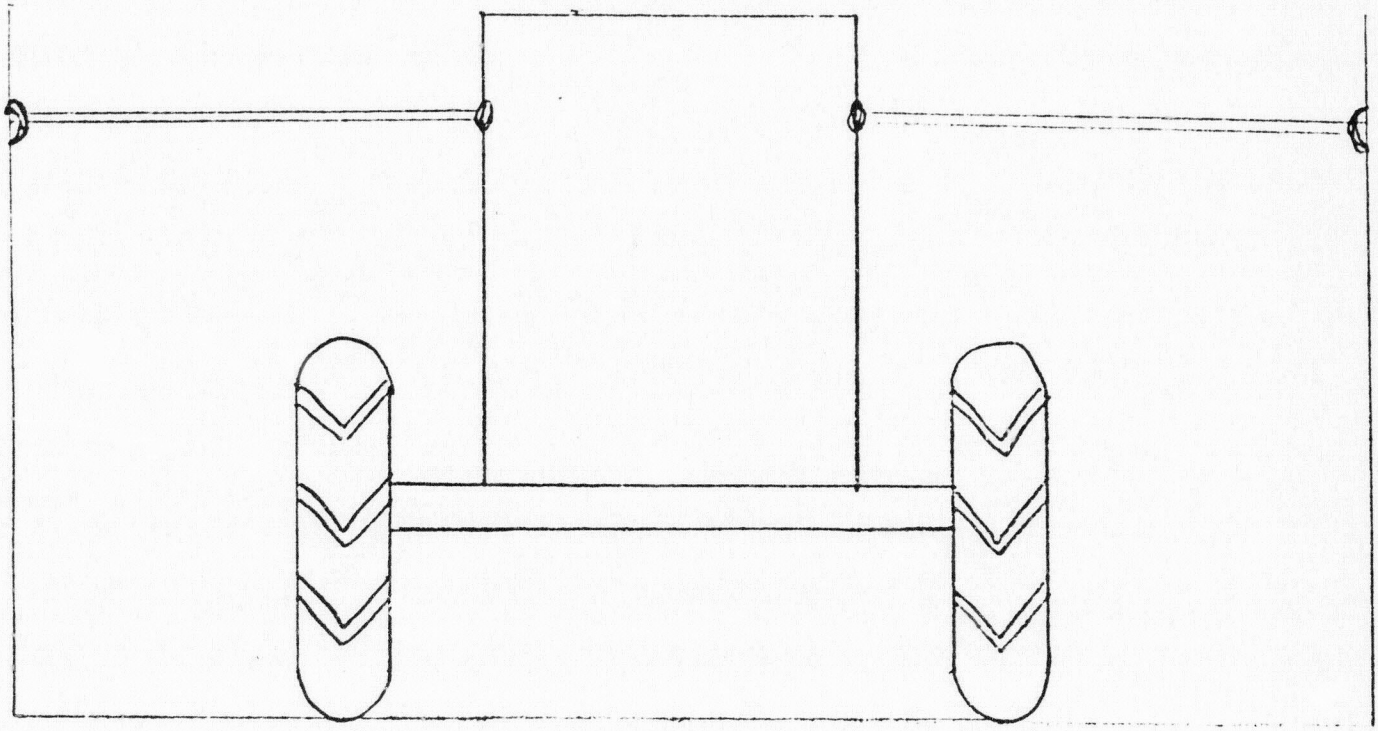
The trial court ignored a sworn admission by respondent that the tractors were improperly secured.

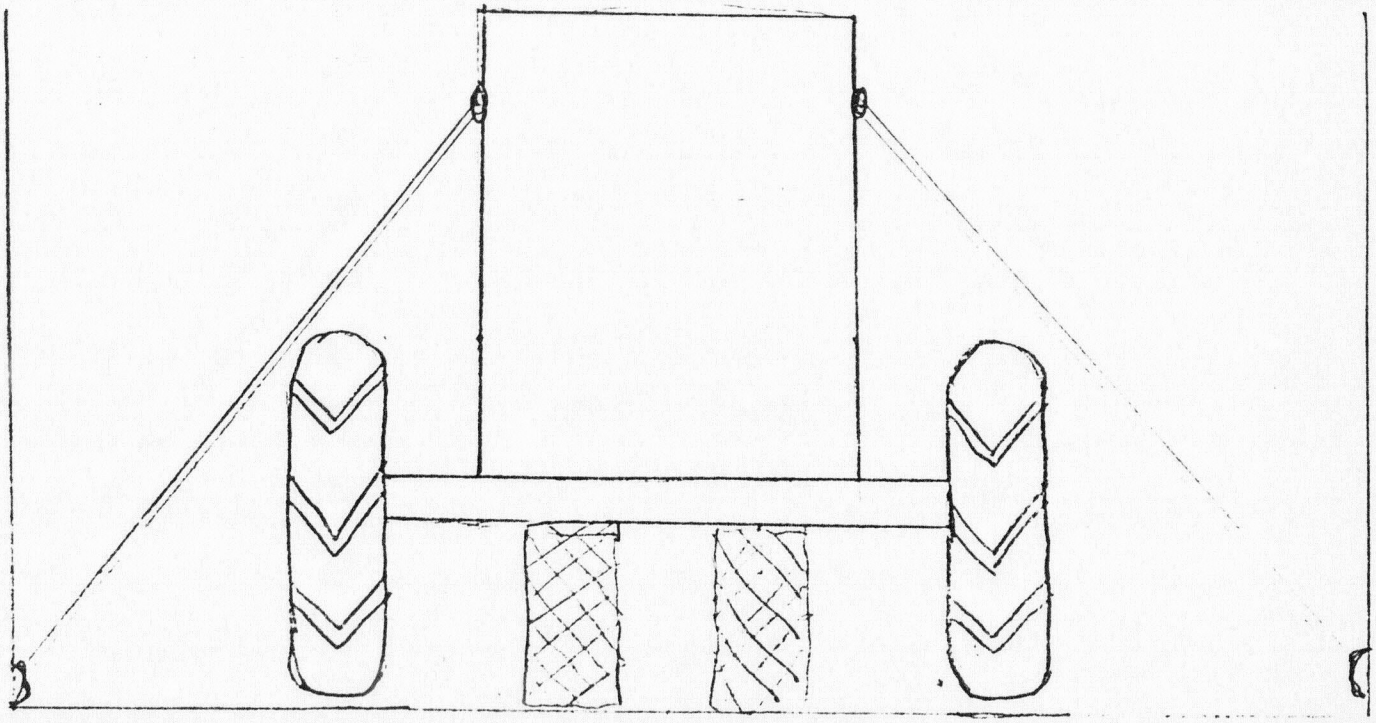
The two Terex tractors weighed 17 tons apiece and were stowed side by side in the forward end of the No. 2 'tween deck. Witnesses for both sides were in unanimous agreement that wheeled vehicles—especially rubber-tired as these were—must be securely held down to prevent any motion as the ship rolls.

> ". . . in securing large tractor with rubber air-filled tires the axles should have been blocked up with timber between the axles and the floor, so that there would be solid support under the axles. The lashings should then be tightened so that the weight of the tractor comes down on the wood blocking instead of the rubber tires. This, according to Wheeler, prevents the tractor during transportation at sea from bouncing up and down on the rubber tires, which would loosen the lashings, and in case one of the tires loses air pressure no casualty would occur. Wheeler testified that without such blocking the tractor was not properly secured because there is no way to hold it firmly in place."
>
> Testimony of defendant's expert, Wheeler, as summarized by Judge Bonsal in *The Farida, supra.*

Failure to immobilize the units allows them to take moving strains against the wires, a force so great it soon snaps them one by one. The approved procedure is to affix heavy wire cables to the vehicle and then secure them to the ship's structure, as close as possible to deck level. Tightening the wires with turnbuckles then pulls the load directly against the wooden blocks, thereby eliminating the rubber tires as a source of motion (A39-40, 136-8, 139-41, 208-9, 244, 246-8).

In sworn answers to interrogatories filed in 1973, respondent's president said that there was no lashing under the axles and that the wires all led horizontally to padeyes on the ship's sides, instead of down to available deck-level fittings (A101-5, 143). The difference is graphically illustrated on the facing page. Despite this proven admission of faulty lashing, the trial court concluded—without citation—that "the tractors were properly lashed" (A7).





The Court's conclusion would have to be based on the testimony of a carpenter foreman who appeared at the trial and testified to an entirely different method of lashing. This contradictory testimony should have been rejected in favor of the earlier admission which was never corrected, even though prominently placed in evidence six days before the trial ended (A142-3). The defense did not call the company president, or the superintendent, or the lashing foreman, or any of the lashers.

The sworn answer of the respondent which admitted faulty lashing was no idle response. Devaney, the president, had gone to Bermuda as soon as the casualty was reported and knew the import of his answer (Ex. 61). It had been prepared under the aegis of experienced counsel and then read by Devaney before he swore in writing that it was true.

The Rules of Civil Procedure are designed to promote and encourage a full disclosure of the facts before trial. What purpose is served by observing these Rules if one cannot rely at trial time on the evidence thereby adduced?

r established admiralty practice in this Circuit, answers to interrogatories are deemed part of the pleadings and no further proof is required to establish facts admitted therein. *Baker Carver & Morell Ship Supplies* v. *Mathiasen, etc.,* 140 F. 2d 522 (2d Cir. 1944); *Morania Barge No. 404, Inc.* v. *M & J Tracy, Inc.,* 312 F. 2d 78 (SDNY 1962). Under the Rules of Civil Procedure, such answers still serve as admissions and can be used by an adverse party for any purpose. *Gridiron Steel Co.* v. *Jones & Laughlin Steel Corp.,* 351 F. 2d 791 (6th Cir. 1966).

Some decisions recognize that newly discovered evidence may prove an earlier answer to be in error, and correction has been allowed. But correction is more than an option; it is obligatory under Rule 26(e)(2). However, at no time —not even when the interrogatory answer was placed in evidence—did defense counsel try to modify it. The com-

mentators call it "intolerable" and inconsistent with professional standards for a party to sit idly by, knowing that such an answer is untrue. 35 F.R.D. 78-9.

IV

The National Cargo Bureau Certificate upon which the court relied did not cover lashing of the Terex tractors, and it would not be adequate proof in any event.

The only evidence cited to support a finding that the tractors had been properly lashed was the National Cargo Bureau Certificate (A7). The surveyor who attended was not available to testify and proof was restricted to documentary evidence. The Bureau witness who produced the records in response to respondent's subpoena said that their surveyors are not constantly on board and only certify as to what they see. The certificate states only that so far as the loading came under the observation of the surveyor, the stowage was in accordance with the recommendations of the National Cargo Bureau. This limited approval is than followed by a prominent disclaimer that it applies only to cargo specifically listed on the certificate, and that listing did not include the Terex tractors.

It has long been held that certificates do not make a ship seaworthy, and National Cargo Bureau certificates have been given little or no weight in the past. *F. W. Pirie Co.* v. *SS Mormactrade*, 1970 A.M.C. 1327 (SDNY, 1970); *Waterman S.S. Corp.* v. *United States S. R. & M. Co.*, 155 F. 2d 687 (5th Cir., 1946).

The surveyor's notes showed his only attendance on January 18* was at 1600 when he examined containers stowed on deck. These notes do not mention the Terex tractors, which conclusively established that he never inspected their lashings (A97-100).

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* The day when the tractors were loaded and the ship sailed.

To strengthen this argument, we noted in our post-trial brief that the containers had been stowed on the closed hatch covers. Since the Terex tractors had been loaded before noon, there was little probability that he had seen the tractors and failed to mention them. The court misconstrued the thrust of this argument and in a footnote, tortuously explains how an inspection could have been made, and from this naked possibility concluded it *was* made, although the certificate—cited as the proof—clearly shows it was not.

V

If, as the trial court speculated, rolls of paper may have first come loose, this was also the responsibility of respondent.

When heavy machines break loose in a rolling ship, they quickly chew up everything in their way. In the No. 2 'tween deck it was rolls of newsprint and the trial court noted the utter disarray which the pictures showed so vividly. The court then commented—without finding—that "rolls of newsprint could have gotten loose" and, inferentially, dislodged the tractors. That supposition again demonstrates unfamiliarity with the evidence. Respondent's own expert testified he found no evidence to support this theory (A249), but the trial court was not deterred. The tractors were stowed in the forward part of the 'tween deck space, along with two containers (which had been lashed to the forward bulkhead and never moved), and a few cases of general cargo. The paper stretched from side to side across the after half of the compartment and was held there by wires and wooden fencing (A17, 122, 168-9). It had been loaded at St. Johns a week earlier, and that stowage had already been subjected to severe testing. In a 2½ day sea voyage from St. Johns to Baltimore, the ship encountered winds and seas of Force 6, which caused her to pitch and roll so violently that she took water on deck (Ex. 87, p. 48-9).

But of even greater importance is the fact that this respondent re-stowed part of the paper in the No. 2 'tween deck at New York and was, therefore, directly responsible for the final lashing. It occurred because certain yellow label (dangerous) cargo had to be given special stowage in No. 1 'tween deck at New York. To make space, 65 tons of paper were removed from No. 1 and stowed with the other paper in No. 2 'tween deck (A225). The movement is recorded on the New York stowage plan (A17) and is not disputed. Thus, it was this respondent who was responsible for the final securing of both the tractors and the paper! It was this respondent who failed to excuse its inadequate lashing of both the tractors and the paper.

Was still more evidence needed? In addition to the tractors and the paper in No. 2 'tween deck, the trial court found that containers on deck broke loose (A6) and the surveyors at Bermuda found that cargo had also shifted in No. 1 'tween deck and in No. 1 lower hold. *The final securing of every one of the foregoing was done by this respondent!* (A15-17, 72, 224-5, 241).

VI

The trial court's emphasis on heavy weather implies a mistaken belief that a sea peril contributed to the casualty.

The storm encountered after leaving New York has relevance only because it provided the force which caused the ship to pitch and roll—a normal expectation for every vessel going to sea. But time after time in its brief opinion, the trial court reverted to the weather with such statements as the vessel was caused "to violently roll", that there was "heavy rolling" when the tractors broke loose, that she "went through a dreadful storm situation", that the pictures at Bermuda indicated "some superforce" turned one of the tractors upside down, that there was

"violent motion of the vessel over a prolonged period of time", that the ship encountered "a dreadful storm that shook the vessel unmercifully," and that when the storm began "the vessel started to roll severely." (A6-8)

Such heavy emphasis is completely inappropriate and entirely irrelevant when a ship encounters weather which would normally be anticipated on a winter voyage past Cape Hatteras. Up to the time the tractors were known to have broken loose, the maximum wind encountered was Force 6 and the maximum roll was 28°;* (Ex. 16). This was the critical period. The adequacy of the lashings is to be measured against the weather encountered when they failed, not at some later time. The trial court made no such distinction and was apparently influenced by winds which increased to Force 8, and by later rolling which—augmented by tons of free surface water in the flooded hold—increased to 40° and almost sank the ship.

This ship encountered no overpowering force, especially up to the time the tractors broke loose. A true sea peril has been defined by this Court on many occasions, one of the latest being *J. Gerber & Co.* v. *SS Sabine Howaldt,* 437 F. 2d 580 (2d Cir., 1971). There, the earlier decisions were reviewed and the conclusion reached that barring special circumstances, a true sea peril would have to be Force 10 or greater. Although the AMAZONIA never encountered a sea peril, the trial court was obviously influenced by a belief that it did.

In this same vein is a footnote comment that "the effects of the storm were apparently worsened" because improper weight distribution made it a "stiff ship", i.e., a preponderance of weight in the lower holds which would tend to shorten the period of roll (A7). The only testimony to support this conclusion came from respondent's expert,

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* Brazilian ships are required to log the maximum roll during each watch.

Wheeler. He had made no calculations but simply cited a "rule of thumb" that approximately two-thirds of the weight should be in the lower holds, and then concluded from looking at the stowage plan that it was not (A231-2).

Stability is determined before leaving port by establishing the weight and location of all cargo, bunkers, fresh water, ballast and stores and from this, calculating the metacentric height, or GM. Wheeler conceded that, "Satisfactory stability is anywhere from 2 to 5 feet GM" (A231-2). The master testified that his chief officer had made a precise mathematical calculation and found the GM to be 3 feet (A49).

Of even greater importance is the master's testimony that the ship rolled normally after putting to sea. Experts for both sides agreed this was a good practical test (A243, 252). In view of this—the only evidence on the point—how could the trial court properly reject it in favor of a generalized conclusion based only on a rough estimate?

VII

There was no intervening failure of the ship's officers to check the lashings.

It is a physical fact that constant tension on a steel wire will tend to stretch it slightly. A turnbuckle not only removes the initial slack—it also pre-tenses the wire so that normal stretching will still leave it taut (A153-4, 157-8). Good care requires that the lashings be checked from time to time on the voyage to insure that tautness. There is no hard and fast rule of how often this should be done, but in *The Farida, supra,* Judge Bonsal found nothing wrong with an inspection the morning following the sailing.

Here, the court has found as a fact that the lashings were checked only eighteen hours out of New York or, as the log records, between 1300 and 1600 on January 19, after receipt

of a storm warning (Ex. 16, 16A, p. 114). Within six hours the ship was in the storm, encountering winds and seas of Force 6. Reasonable standards do not require two consecutive inspections of lashings in anticipation of heavy weather, and there is no such testimony.

In connection with the lashings, the court also found that the tractors were lashed "with suitable materials" (A7), all of which had been supplied by respondent. Under its warranty, respondent was liable for any failure of the gear it provided, even if due to latent defect. *Italia, supra,* at pages 323-4. But we need not reach that far. There was uncontradicted expert testimony that the turnbuckles were of a poor design which made their strength uncertain* and, because of this, had been banned from use on U.S. Maritime Commission vessels for loads over 15 tons (A144). The two tractors, lashed together as they were (A6) comprised a 34-ton load and at Bermuda, at least one of the turnbuckles was found to have pulled apart. It was duly photographed, tested in a laboratory, and found to have only 61% of the holding strength of the wire (A125, 151-2).

VIII

The trial court was diverted and misled into accepting speculation and inference as the equivalent of fact.

The opinion below is a perfect example of how innuendo and suggestion can be skillfully built into a major accusation which really proves nothing. Although there is no direct finding, the opinion clearly implies that the tractors battered the ship's sides over a long period of time, and

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* Instead of a solid forged piece connecting the two threaded ends, flat bar plates were welded to nuts. They look alike but the strength of each weld varies.

that the officers and crew were diverted from remedial action by a fire on board, or perhaps by the storm itself.

One hardly knows where to begin to expose this facade. Even assuming it was all true, what difference would it make if the crew had heard the tractors as soon as they broke loose? Is it seriously suggested that someone should have entered the hold in the middle of a storm and attempted to capture two 17-ton tractors as they crashed from side to side? Would it have been negligent not to do so? The question answers itself.

The irony of this whole argument is that 99% of the reasoning is specious. It is reasonable to assume that if a loose tractor did repeatedly strike the ship's side, it would make noises. There is no such log entry and the master testified that no noise was heard, but respondent's expert, Wheeler, said such a noise *would* have been heard in the engine room and should have been logged.* Ergo, since the tractor would have made a noise which should have been heard, it must have been banging around for a long time. We are not supposed to consider the possibility —admitted by both of respondent's experts (TM. 444, A237)—that the first 34-ton blow pierced the ship's side, or that subsequent contacts of the plunging tractors were deadened by the rolls of paper.

Having concluded that the tractors must have been thrashing around before the ship was holed, the court was then led to believe that a fire diverted attention from these movements. The bits and pieces from which this conjecture was fabricated are these. When a deck container broke loose during the storm (A6), it damaged an oil vent pipe and also damaged the door to a resistor house on deck. The door was so badly jammed that it had to be cut loose at Bermuda. Thus, all surveyors saw some burn

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* For an example of the decision making as to whether a noise should be recorded, see *Zander & Co.* v. *Mississippi Shipping Co.*, 171 F.S. 184, 190 (E.D. La. 1959).

marks which the cutting torch had left on the bulkhead, as well as signs of an oil spill from the vent pipe (Ex. 30, A73, 132). Add to this a routine voyage report in which the master noted the fire fighting ability of the crew could stand improvement (A91-2), and the stage is set. Respondent's expert, Wheeler, who did not go aboard until several weeks later at Savannah, theorized that the electrical coils in the resistor house had become red hot and started a fire (A238). This is what the trial court called "substantial evidence that there was a fire" (A8). If that is substantial evidence, then what are these?

1. Respondent's surveyor went on board and examined the ship at Bermuda. He did not even mention a fire in his report (A117-20).

2. The master was examined before trial by respondent and was never asked about a fire. (Ex. 69).

3. Assuming that somehow a fire did start on the open deck, how long would it have lasted with seas regularly washing the deck in a storm?

4. The coils in the resistor house serviced the ship's electrical winches and would, of course, be completely inactive while at sea, and behind a watertight steel door (T.M. 432, A238-9).

It is disheartening to see a trial judge dignify relative trivia with serious comment, especially when the facts are so contrary to his unsupported conclusion, and where that conclusion adds nothing to a determination of whether or not the tractors were properly stowed at New York.

Conclusion

The Terex tractors broke loose in ordinary weather, thereby establishing a clear breach of respondent's duty to fulfill its contractual warranty of workmanlike conduct by proper lashing and securing.

The trial court either misunderstood or was misled into thinking it was a tort action and failed to deal with the real issues or to apply the controlling law.

The decision of the court below should be reversed and remanded for assessment of damages.

Respectfully submitted,

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Due and timely service of TWO copies of the within BRIEF is hereby admitted this 11TH day of JANUARY 1977

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Attorneys for APPELLEE